Supreme Court, U.S.
FILED

99547 SEP 28 1999

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

PALOMAR POMERADO HEALTH SYSTEM,
A HEALTH CARE DISTRICT,

Petitioner,

v.

KIMBERLY BELSHE, DIRECTOR OF THE
CALIFORNIA DEPARTMENT OF HEALTH SERVICES;
DIETER MERKLE; AND CURTIS COTTON,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

PETITION FOR WRIT OF CERTIORARI

PATRIC HOOPER
Counsel of Record
California Bar No. 57343
HOOPER, LUNDY & BOOKMAN, INC.
1875 Century Park East, Suite 1600
Los Angeles, CA 90067-2799
Telephone: (310) 551-8165
Facsimile: (310) 551-8181
Attorneys for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

41pp

QUESTION PRESENTED

Whether a health care provider, which is owned and operated by a "health care district," (a local public entity), has standing to bring an action against officials of a state Medicaid agency in federal court to challenge the validity of state Medicaid regulations on supremacy clause grounds.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceedings below were the petitioner, Palomar Pomerado Health System, a health care district, and the respondents, Kimberly Belshe, former Director of the California Department of Health Services, and Dieter Merkle and Curtis Cotton, employees of the California Department of Health Services. They continue to be the parties before this court.[1]

---

[1] Diana M. Bonta, R.N., Dr. P.H., however, has replaced Kimberly Belshe as the Director of the California Department of Health Services.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PETITION FOR WRIT OF CERTIORARI	1
OPINIONS BELOW	1
JURISDICTION	1
STATUTES AND REGULATIONS	2
STATEMENT OF THE CASE	4
A. Statement Of The Facts	4
B. Course Of The Proceedings	5
REASONS FOR GRANTING THE WRIT	8
A. The Ninth Circuit's Decision Establishing A Ban On Any Constitutional Challenge By A Political Subdivision Against Its "Parent State," Including A Supremacy Clause Challenge, Is Expressly Inconsistent With The Holdings Of At Least Three Other Circuits And Impliedly Inconsistent With The Holding Of This Court Allowing Providers Of Health Care Services Standing To Assert Supremacy Clause Challenges To State Medicaid Agency Actions	8
B. Allowing Public Hospitals Standing To Enforce The Provisions Of The Federal Medicaid Law Under The Supremacy Clause Is Of considerable Importance To The Delivery Of Health Care Services	13
CONCLUSION	16

TABLE OF CONTENTS – Continued

Page

APPENDIX

Opinion of United States Court of Appeals for the Ninth Circuit.....App. 1

Suggestion for Rehearing En Banc Order from the United States Court of Appeals for the Ninth Circuit .....App. 15

42 U.S.C. § 1396a(a)(13) [Current].....App. 16

42 U.S.C. § 1396a(a)(13) [Prior to Oct. 1, 1997]....App. 16

42 U.S.C. § 1396a(a)(30).....App. 18

TABLE OF AUTHORITIES

Page

CASES

Branson School District RE-82 v. Romer, 161 F.3d 619 (10th Cir. 1998) 11, 13

Burbank-Glendale-Pasadena Airport Authority v. Burbank, 136 F.3d 1360 (9th Cir. 1998) 13

City of Charleston v. Public Serv. Comm., 57 F.3d 385 (4th Cir. 1995) 12

Indian Oasis-Baboquivari v. Kirk, 91 F.3d 1240 (9th Cir. 1996), *rehearing en banc granted*, 102 F.3d 999 (9th Cir. 1996), *appeal dismissed*, 109 F.3d 634 (9th Cir. 1997) (*en banc*) 12, 13

Orthopaedic Hospital v. Belshe, 103 F.3d 1491 (9th Cir. 1997) 3, 14

Rogers v. Brockette, 588 F.2d 1057 (5th Cir. 1979) ... 9, 10

South Macomb Disposal Auth. v. Township of Washington, 790 F.2d 500 (6th Cir. 1986) 12

United States v. Alabama, 791 F.2d 1450 (11th Cir. 1986) 12

Wilder v. Virginia Hospital Association, 496 U.S. 498 (1990) 3, 9, 10, 14

STATUTES

28 U.S.C. § 1254(1) 2

28 U.S.C. § 1291 2

28 U.S.C. § 1331 1

42 U.S.C. §§ 1396 *et seq.* 2, 3, 6

42 U.S.C. §§ 1983 *et seq.* 1

TABLE OF AUTHORITIES – Continued

Page

Calif. Welf. & Inst. Code §§ 14000 *et seq.* 2

Calif. Health and Safety Code §§ 32000, *et seq.* 4

Pub.L. No. 105-33, § 4711(a), 111 Stat. 251, 507-08 (1997) 3

REGULATIONS

42 C.F.R. § 400.203 [1998] 2, 8

42 C.F.R. §§ 430.1 *et seq.* [1998] 2

42 C.F.R. §§ 447.201 *et seq.* [1998] 3

42 C.F.R. § 447.272(b) [1998] 14

Title 22, California Code of Regulations, § 51511(a)(2) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner, Palomar Pomerado Health System ("Palomar Pomerado"), respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on June 29, 1999. As indicated below, Palomar Pomerado's timely filed Suggestion for Rehearing En Banc was denied by the Court of Appeals on September 15, 1999.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 180 F.3d 1104 (9th Cir. 1999), and is reprinted in the Appendix at 1-14.

The unpublished judgment of the United States District Court for the Central District of California (Levi, J.) was vacated by the Court of Appeals. Because the decision and judgment of the District Court did not discuss the issue for which certiorari is requested, and because the judgment was vacated by the Court of Appeals, the District Court's Judgment and decision are not reprinted in the Appendix.

JURISDICTION

Pursuant to the Civil Rights Act, 42 U.S.C. §§ 1983, *et seq.*, and pursuant to 28 U.S.C. § 1331, Palomar Pomerado filed an original action in the District Court for the Eastern District of California challenging the respondents'

application of certain state established Medicaid payment policies. Following the granting of summary judgment in favor of the respondents, Palomar Pomerado appealed to the Court of Appeals for the Ninth Circuit pursuant to 28 U.S.C. § 1291.

On appeal, the United States Court of Appeals vacated the decision of the District Court and dismissed the appeal on the grounds that, as a political subdivision of the State of California, Palomar Pomerado lacked standing to bring an action against the respondents in federal court. Appendix at 9.

The jurisdiction of this Court to review the final decision of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

This case involves the administration of the Medicaid program, Title XVIII of the Social Security Act, 42 U.S.C §§ 1396 *et seq.*, and 42 C.F.R. §§ 430.1 *et seq.* [1998]. The Medicaid program is jointly administered by the federal and state governments. The California Department of Health Services ("State DHS") is the single state medicaid agency charged with administering the Medicaid program (known as "Medi-Cal") in California. Calif. Welf. & Inst. Code §§ 14000 *et seq.*

Under the Medicaid program, health care services are furnished to Medicaid beneficiaries by "providers," such as hospitals. *See* 42 C.F.R. § 400.203 [1998]. Providers are paid directly by the single state Medicaid agencies for

rendering health care services to Medicaid patients. State Medicaid payment rates for long-term health care services, such as those furnished by Palomar Pomerado in this case, are governed by various provisions of the federal Medicaid law and regulations, including 42 U.S.C. § 1396a(a)(13), 42 U.S.C. § 1396a(a)(30), and 42 C.F.R. §§ 447.201 *et seq.* [1998].

Until relatively recently, the provisions of § 1396a(a)(13) required state Medicaid agencies to find and assure that their payment rates for long-term care services were reasonable and adequate to meet the costs that must be incurred by efficiently and economically operated providers.[2] *See Wilder v. Virginia Hospital Association,* 496 U.S. 498 (1990).

Section 1396a(a)(30) imposes separate efficiency and cost standards on a state Medicaid agency's rate-making process for health care services furnished by Medicaid providers. However, there are no specific findings or assurances required. *See Orthopaedic Hospital v. Belshe,* 103 F.3d 1491 (9th Cir. 1997). The relevant portions of §§ 1396a(a)(13) and 1396a(a)(30) are set forth in the Appendix at 16-19.

---

[2] The finding and assurance process was repealed by Congress, effective October 1, 1997. *See* Pub.L. No. 105-33, § 4711(a), 111 Stat. 251, 507-08 (1997).

STATEMENT OF THE CASE

A. Statement Of The Facts

Palomar Pomerado is a health care district formed under California state law, specifically, California Health and Safety Code §§ 32000 *et seq.* Appendix at 6. Among the health care services provided by Palomar Pomerado are long-term health care services, which Palomar Pomerado offers and provides to all of its patients requiring such services, including Medicaid patients, privately-insured patients, and self-pay patients. Appendix at 2.

In April 1994, Palomar Pomerado changed from a billing system, based on the level of care required by a patient, to a flat rate system based on the type of room the patient occupied. At that same time, Palomar Pomerado initiated a "prompt-pay discount" for patients who paid privately or were privately insured. The discount is not offered to the Medi-Cal program. Appendix at 2-3.

Palomar Pomerado billed the Medi-Cal program (State DHS) for long-term care services furnished to Medi-Cal patients at the specific Medi-Cal rates established by State DHS pursuant to Title 22, California Code of regulations, § 51511(a)(2). Those Medicaid per diem rates equaled the lesser of a provider's costs per day, as audited and projected by State DHS, or a maximum of $214.90 per day. Appendix at 3.

While the Medicaid rates for long-term care services specifically established by State DHS pursuant to Title 22, California Code of Regulations, § 51511(a)(2), were issued to meet federal Medicaid requirements, respondents are

not applying those rates to Palomar Pomerado. Rather, they are applying other state regulations to Palomar Pomerado. Those other regulations prohibit providers from charging Medi-Cal more than a provider's usual fee charged to the general public for the same services. Appendix at 3.

Based on the application of this latter State DHS policy, the respondents, the Director of State DHS and two of her Medi-Cal auditors, concluded that the discounted rates accepted by Palomar Pomerado for services furnished to its self-pay patients constituted Palomar Pomerado's usual fees charged to the general public. As a result, rather than paying Palomar Pomerado the per diem rates established by State DHS for long-term care services, respondents insist on reducing Palomar Pomerado's Medi-Cal payments to the discounted rates accepted by Palomar Pomerado from self-pay patients under Palomar Pomerado's prompt-pay policy. Appendix at 3. The application of this state established policy reduced the Medi-Cal payments to Palomar Pomerado by several millions of dollars for various fiscal years.

B. Course Of The Proceedings

In addition to challenging the payment reductions imposed by respondents through the state administrative appeal process, Palomar Pomerado initiated a federal court action against respondents on February 24, 1997. The federal court action was brought pursuant to the Civil Rights Act and was intended to enjoin permanently the respondents and their agents from reducing the Medicaid payments owing to Palomar Pomerado for long-term

care services furnished to Medicaid patients below the rates required to be paid under the governing federal Medicaid law, including enjoining respondents from reducing the Medicaid reimbursement to the discounted rates charged under the prompt-pay program. Palomar Pomerado also sought an order from the District Court declaring State DHS' practice and policy to be in violation of the federal Medicaid law and regulations and the United States Constitution.[3] Appendix at 4.

On September 5, 1997, respondent moved for summary judgment. On March 30, 1998, the District Court determined that respondents' practice and policy were consistent with that version of the federal Medicaid law known as the "Boren Amendment," 42 U.S.C. § 1396a(a)(13)(A). The District Court also determined that respondents' actions did not violate Palomar Pomerado's due process rights. The District Court did not determine whether the other provisions of the federal Medicaid law, specifically, 42 U.S.C. § 1396a(a)(30) prohibited State DHS from reducing Palomar Pomerado's Medicaid payment rates to the discounted payment rates accepted from self-pay patients.

Palomar Pomerado timely appealed the District Court's judgment to the Court of Appeals. On appeal, State DHS argued for the first time that Palomar Pomerado, as a political subdivision of the state, lacked standing to sue the state in federal court to challenge the

---

[3] Palomar Pomerado's primary allegation was based on the supremacy clause of the Constitution. At this stage of the proceedings, Palomar Pomerado is limiting its argument to the supremacy clause violation.

validity of the state regulations as being violative of the due process and supremacy clauses of the United States Constitution. Appendix at 4.

On June 29, 1999, the Court of Appeals issued its decision vacating the judgment of the district court and dismissing the appeal on the grounds that, as a political subdivision of the state, Palomar Pomerado lacked standing to bring an action against the state in federal court – at least to the extent that such action challenges the validity of the state regulations on due process and supremacy clause grounds. Appendix at 9.

Circuit Judge Hawkins filed a concurring opinion in which he acknowledged that the majority of the panel was correct in applying current circuit law, but suggested that because current circuit law was contrary to that of other circuits, en banc consideration of the standing issue occur in this case. Appendix at 10.

Palomar Pomerado timely filed a Suggestion for Rehearing En Banc. On September 15, 1999, however, the Court of Appeals rejected the Suggestion for Rehearing En Banc. Appendix at 15.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Decision Establishing A Ban On Any Constitutional Challenge By A Political Subdivision Against Its "Parent State," Including A Supremacy Clause Challenge, Is Expressly Inconsistent With The Holdings Of At Least Three Other Circuits And Impliedly Inconsistent With The Holding Of This Court Allowing Providers Of Health Care Services Standing To Assert Supremacy Clause Challenges To State Medicaid Agency Actions.

Palomar Pomerado is a district health care provider, which, like other health care districts, was established solely to furnish health care services to patients in its service area including Medicaid patients. As such, Palomar Pomerado is first and foremost a "provider" of health care services.[4] As a provider of Medicaid services, Palomar Pomerado is governed by the identical federal and state Medicaid law's regulations and policies that govern other providers of health care services, including nonpublic providers. Similarly, as the single state Medicaid agency responsible for administering California's Medicaid program, State DHS is required to treat Palomar Pomerado like any other Medicaid participating provider, and must therefore abide by the federal Medicaid laws and regulations which preempt contrary or

---

[4] As pointed out above, in order to participate as a provider of health care services in the federal/state Medicaid program, Palomar Pomerado was required to enter into a provider agreement with State DHS. *See* 42 C.F.R. § 400.203 [1998].

inconsistent state constitutional provisions, laws, or regulations. *See Wilder v. Virginia Hospital Association, supra,* 496 U.S. 498.

In *Wilder,* this Court concluded that health care providers have standing to challenge the actions of state Medicaid agency officials and employees in federal court pursuant to the Civil Rights Act to assure that such state personnel comply with the governing *federal* Medicaid statutes and regulations as required under the supremacy clause of the Constitution. In reaching this decision, this Court made no exceptions for those health care providers which are owned or operated by public entities, including local public entities. Nevertheless, the Ninth Circuit's decision deprives all public health care providers of the protection of the supremacy clause by depriving them of the standing necessary to enforce the federal law in the federal courts.

The Ninth Circuit's decision applies a *per se* rule prohibiting any and all challenges by local public entities, including supremacy clause challenges brought by public health care providers to enforce the governing provisions of the federal Medicaid laws and regulations. As pointed out by Judge Hawkins in his concurring opinion in this case, the blanket prohibition on standing is inconsistent with the specific holdings of the Fifth, Tenth, and Eleventh Circuit Courts of Appeals and the implied holdings of other circuits. Appendix at 9-14.

In *Rogers v. Brockette,* 588 F.2d 1057 (5th Cir. 1979), the Fifth Circuit discussed the history of cases denying standing to political subdivisions that sued their parent states. The Court focused on the foundational Supreme Court

cases which dealt with the rights of municipalities under the contract clause, the just compensation clause, and equal protection clause of the Constitution. The Fifth Circuit pointed out that this Court's primary concern in those situations was that a state, whose relationships with its municipalities were bound by the broad constitutional principles that govern relations with private parties, would be practically unable to legislate. However, as the Fifth Circuit emphasized, not every constitutional provision presents the danger of such interference. For example, the Fifth Circuit concluded in *Rogers* that where a municipality alleged a violation of federal law under the supremacy clause, it was Congress, not the Constitution, that was interfering in the states' internal political organization.

That identical reasoning applies here. As this Court held in *Wilder,* Congress dictated how Medicaid state agencies must perform their Medicaid activities. Notwithstanding a rather broad grant of discretionary authority to the state Medicaid agencies, Congress has required state Medicaid agencies to adhere to certain minimal, procedural and substantive requirements. By allowing providers to enforce the supremacy clause of the Constitution against those state Medicaid agencies that are noncompliant with the federal Medicaid law, the courts help to assure that the overriding federal Medicaid requirements are satisfied.

The Tenth Circuit has similarly interpreted the cases more narrowly than the Ninth Circuit describing them as standing only for the limited proposition that a municipality may not bring a constitutional challenge against its

creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights. *See Branson School District RE-82 v. Romer,* 161 F.3d 619, 628 (10th Cir. 1998). Challenges based on the latter category of rights do not raise the spectre of the "chaos" of lawsuits generated by "mere disagreement by a political subdivision with the policies of its parent state." 161 F.3d at 630. Thus, the Tenth Circuit allowed a school district with powers similar to a health care district to invoke the supremacy clause against its parent state for violation of a federal law.

Once again, the reasoning of the Tenth Circuit is fully applicable here. Palomar Pomerado's complaint is premised primarily on the supremacy clause. By relying on that clause, Palomar Pomerado seeks to enforce the federal Medicaid requirements written and intended by Congress to protect all providers of health care services without regard to the nature of their ownership. Palomar Pomerado is not relying on any constitutional provisions intended to protect only individual rights.

Judge Hawkins also pointed out that both the Fifth and Tenth Circuits have noted another limitation on the breadth of the general rule prohibiting political subdivisions from suing their state parents. That distinction is between property held and used for governmental purposes, on the one hand, and property that is held for the same purposes that property is held by private corporations or individuals, on the other hand. Health care districts, such as Palomar Pomerado, operate no differently from health care providers owned or operated by private

corporations or other private entities. There is no functional or operational difference between a district health care provider and a privately owned health care provider. In short, there is nothing uniquely "governmental" about a health care district's operation of a hospital.[5]

Judge Hawkins also correctly pointed out that the Eleventh Circuit has expressly rejected a *per se* rule, citing *United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir. 1986) Appendix at 13. He also noted that other circuits have, at least, suggested that they do not favor a *per se* rule. *See City of Charleston v. Public Serv. Comm.*, 57 F.3d 385, 389-90 (4th Cir. 1995) [noting that a political subdivision's standing regarding a non-Fourteenth Amendment claim was "unclear" and proceeding to resolve the issue on the merits]; *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 504 (6th Cir. 1986) [noting that "there may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation"]. Appendix at 13-14.

Clearly, as expressly acknowledged by Judge Hawkins, the Ninth Circuit is alone in having barred supremacy clause challenges by political subdivisions against their parent states. Appendix at 14.[6] *See, also,*

---

[5] If this case involved state restrictions on Palomar Pomerado's authority to impose taxes, a "governmental function," Palomar Pomerado would not be seeking review by this Court.

[6] Other Circuit judges of the Ninth Circuit have also criticized the *per se* rule. *See* Judge Circuit Reinhart's dissenting opinion in *Indian Oasis-Baboquivari v. Kirk*, 91 F.3d 1240,

Branson School District RE-82 v. Romer, 161 F.3d at 630 ["the only Circuit to bar supremacy clause challenges" is the Ninth Circuit.]

B. Allowing Public Hospitals Standing To Enforce The Provisions Of The Federal Medicaid Law Under The Supremacy Clause Is Of considerable Importance To The Delivery Of Health Care Services.

A disproportionate amount of health care services is provided to Medicaid patients and other indigent patients by public hospitals, including public university hospitals, county hospitals, municipal hospitals, and health care districts, such as Palomar Pomerado. These public hospitals are more often than not the providers of last resort for Medicaid patients, uninsured patients, and other indigent patients. Thus, if any category of health care providers should have access to the federal courts to ensure that state Medicaid agencies comply with federal Medicaid laws and regulations, public hospitals are such providers. Yet, the Ninth Circuit's ruling creates the anomalous situation that public hospitals are the only

---

1245-1261 (9th Cir. 1996), *rehearing en banc granted,* 102 F.3d 999 (9th Cir. 1996), *appeal dismissed,* 109 F.3d 634 (9th Cir. 1997) (*en banc*). Because Judge Reinhart's view was apparently shared by several other judges of the Ninth Circuit, the Ninth Circuit ordered the standing issue to be heard *en banc.* However, the issue was subsequently rendered moot because the case was dismissed for lack of jurisdiction on other grounds. Also, more recently, Circuit Judge Kozinski has suggested that the standing issue "deserves exploration" in connection with determining whether a supremacy clause exception should be created. *See Burbank-Glendale-Pasadena Airport Authority v. Burbank,* 136 F.3d 1360, 1364-1365 (9th Cir. 1998).

class of hospitals which lack standing to enforce supremacy clause challenges in federal courts.

Public hospitals have, in fact, participated in many actions brought in the federal courts to require state Medicaid agencies to comply with federal Medicaid law. For example, in *Orthopaedic Hospital v. Belshe, supra,* the California Association of Hospitals and Health Systems, whose members include public hospitals, such as county hospitals, and publicly owned teaching hospitals, was a plaintiff. In that case, the Ninth Circuit decided that the California State Medical agency, State DHS, violated Medicaid law in connection with establishing Medi-Cal payment rates for outpatient hospital services. The court made no exception for public hospitals.

Similary, in *Wilder,* the Virginia Hospital Association, whose members also include public hospitals, was expressly held to have standing to enforce the provisions of the governing federal Medicaid law. Public hospitals should not have to form nonpublic trade associations to enforce and protect their rights in the federal courts. They should have the same rights of standing in the federal courts as privately owned hospitals and other health care providers.

It must also be pointed out that none of the federal Medicaid statutes or regulations makes distinctions between public and private hospitals except for state-owned and operated hospitals. Only state-owned hospitals are required to be categorized separately from other hospitals in determining certain payment limits under the Medicaid laws and regulations. *See, for example,* 42 C.F.R. § 447.272(b) [1996]. However, health care districts, such as

Palomar Pomerado, are not state-owned or operated hospitals for purposes of this federal regulation. Rather, they are owned and operated by local public entities and function no differently than any other hospital or health care provider.

From the standpoint of health care patients, including the self-pay patients who are injured by State DHS's action in this case, there is no difference between a public hospital and a private hospital. However, if Palomar Pomerado is not permitted to maintain its action against State DHS in the federal courts, those self-pay patients who will be injured by Palomar Pomerado's inability to continue to give such patients discounted rates will be treated much differently from patients who receive their services at other hospitals.

Finally, it must be emphasized that the standing issue is not unique to public hospitals in the Ninth Circuit. As the Court is well aware, the Medicaid program is a national program. Public hospitals throughout the country participate in the program as "safety net" providers of health care services. Such hospitals should have no greater or lesser rights than privately-owned hospitals to enforce the provisions of the governing federal Medicaid law and regulations through the federal court system. However, if the Ninth Circuit decision is permitted to stand, public hospitals in the Ninth circuit will be foreclosed from asserting their rights in federal court while public hospitals in other circuits will continue to have the opportunity to avail themselves of the federal courts to

enforce their rights. This is the precise type of disparate result which this Court is intended to reconcile.

CONCLUSION

The Court of Appeals' decision regarding the standing of public hospitals in federal court is inconsistent with at least three other Courts of Appeals and at least impliedly inconsistent with the ruling of this Court clearly allowing health care providers, regardless of the nature of their ownership, to bring actions in federal court to enforce the provisions of the federal Medicaid laws and regulations pursuant to the supremacy clause of the United States Constitution. In order to assure uniformity in the administration of the courts and the Medicaid program, this Court is thus respectfully requested to grant the Petition for a Writ of Certiorari to decide the important question of law raised by this Petition.

Dated: September 27, 1999

Respectfully submitted,

PATRIC HOOPER
HOOPER, LUNDY & BOOKMAN, INC.

Attorneys for Petitioner,
Palomar Pomerado Health System

PALOMAR POMERADO HEALTH SYSTEM, a Health Care District, Plaintiff-Appellant,

v.

Kimberly BELSHE; Dieter Merkle; Curtis Cotton,[1] Defendants-Appellees.

No. 98-15794.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted May 12, 1999.

Decided June 29, 1999.

Patric Hooper, Hooper, Lundy & Bookman, Los Angeles, California, for plaintiff-appellant.

Marsha Ann Bedwell, Deputy Attorney General, Sacramento, California, for defendants-appellees.

Appeal from the United States District Court for the Eastern District of California; David F. Levi, District Judge, Presiding. D.C. No. CV-97-00294-DFL.

Before: LAY,[2] PREGERSON, and HAWKINS, Circuit Judges.

Opinion by Judge PREGERSON; Concurrence by Judge HAWKINS.

---

[1] Defendant Belshe is the Director of the California Department of Health Services. Defendants Merkle and Cotton are auditors employed by the department.

[2] The Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

PREGERSON, Circuit Judge:

This action arises out of a California Department of Health Services ("DHS") audit of Plaintiff Palomar Pomerado Health System's billing practices.

DHS asks us to decide whether a health care district created by the State of California has standing to sue the state in a federal court to challenge the validity of state regulations on federal constitutional grounds. We answer in the negative.

I.

Palomar Pomerado is a health care district formed under California law. It provides long-term health care services at two "distinct part nursing facilities"[3] in San Diego County, California. Palomar Pomerado provides services to privately insured patients, Medi-Cal patients, and uninsured patients who pay on their own.

In April 1994, Palomar Pomerado switched from a billing system based on the level of care the patient required to a "flat rate" system based on the type of room the patient occupied. At the same time, Palomar Pomerado introduced a "prompt pay discount" for patients who paid privately or who were privately insured. Palomar Pomerado does not offer the discount to

---

[3] A "distinct part nursing facility" operates as a distinct part of a hospital as opposed to a freestanding nursing facility which is not part of a hospital. Palomar Pomerado's two distinct part facilities are Palomar Continuing Care Center, a distinct part of Palomar Medical Center, and Villa Pomerado, a distinct part of Pomerado Hospital.

Medi-Cal. Under the prompt pay discount policy, patients who paid their bills within thirty days receive a fifty percent discount.

The Boren Amendment, 42 U.S.C. § 1396a(a)(13)(A) (repealed by Pub.L. No. 105-33, § 4711(a), 111 Stat. 251, 507-08 (1997)), requires states to reimburse providers such as Palomar Pomerado at a rate that is "reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities." In California, reimbursement is governed by Title 22, California Code of Regulations, section 51511(a)(2). Section 51511(a)(2) provides that the per diem reimbursement rate for distinct part nursing facilities such as Palomar Pomerado "shall be the lesser of the facility's costs as projected by [DHS] or $214.90."

A separate California regulation prohibits providers such as Palomar Pomerado from submitting "claim[s] for reimbursement for the rendering of health care services to a Medi-Cal beneficiary in any amount greater or higher than the usual fee charged by the provider to the general public for the same service." 22 C.C.R. § 51480(a). DHS enforces section 51480(a) through annual audits. Following an audit for Fiscal Year Ending ("FYE") June 30, 1994, DHS found that the discounted rate under the "prompt pay" program was Palomar Pomerado's "usual fee" and concluded that Palomar Pomerado had overcharged the state by $558,000 for the period between April 1, 1994 and June 30, 1994. Accordingly, DHS brought an administrative recoupment action. Palomar Pomerado filed an administrative appeal on grounds separate from those

Palomar Pomerado raises here.[4] Since the FYE June 30, 1994 audit, DHS has continued to enforce 22 C.C.R. § 51480(a) against Palomar Pomerado.

On February 24, 1997, Palomar Pomerado brought this action against DHS to permanently enjoin defendants and their agents "from reducing the Medi-Cal payment rates owing to Palomar Pomerado for distinct part skilled nursing facilities services furnished to Medi-Cal patients below the rates required to be paid under . . . federal Medicaid law, including enjoining them from reducing reimbursement to the discounted [rates]" charged under the prompt pay program to patients who pay privately or who are insured privately. Palomar Pomerado also sought "an order declaring the practice and policy of [DHS] . . . to be in violation of the federal Medicaid law and regulations and the United States Constitution," and "an order declaring that plaintiff is entitled to provide a prompt-pay discount to its private-pay patients without jeopardizing its right to receive Medi-Cal payments [from the state] at the rates . . . contained in 22 CCR Section 51511." Palomar Pomerado also sought reimbursement for the costs of its action and for its attorneys' fees.

On September 5, 1997, DHS moved for summary judgment. On March 30, 1998, the district court determined that DHS's practices were consistent with the Boren Amendment, and that DHS had not violated Palomar Pomerado's due process rights. Accordingly, the

---

[4] Palomar's administrative appeal was decided on April 26, 1999.

district court granted DHS's motion for summary judgment. Palomar Pomerado appeals. We dismiss for lack of standing.

II.

On appeal, DHS argues for the first time that Palomar Pomerado, as a political subdivision of the state, has no standing to sue the state in federal court to challenge the validity of state regulations as violative of the Due Process Clause, U.S. Const. amend. XIV, or the Supremacy Clause, U.S. Const. art. VI, cl. 2.

It is well-settled that "[s]tanding is a necessary element of federal-court jurisdiction." *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231, 233 (9th Cir.1980) (citing *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975)). This jurisdictional issue is not waived because it was not raised in the district court. *See South Lake Tahoe*, 625 F.2d at 233 ("Although the district court passed over the standing issue we must consider it because it governs our jurisdiction as well.").

A.

Under established Ninth Circuit law, "[p]olitical subdivisions of a state may not challenge the validity of a state statute" in a federal court on federal constitutional grounds. *Id.* (quoting *City of New York v. Richardson*, 473 F.2d 923, 929 (2d Cir.1973)); *see also Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360, 1363-64 (9th Cir.1998) (holding that the rule of *South Lake*

Tahoe applies to both Fourteenth Amendment and Supremacy Clause claims.) "This is true whether the defendant is the state itself or another of the state's political subdivisions." *South Lake Tahoe,* 625 F.2d at 233 (citations omitted).

Palomar Pomerado's claims are based on Fourteenth Amendment and Supremacy Clause grounds. We must determine (1) whether Palomar Pomerado is a "political subdivision" of the State of California, and if so, (2) whether, by suing the defendants named in this action, Palomar Pomerado brings this action against the state.

B.

Palomar Pomerado is a health care district. It is a public corporation formed under California law. *See* Cal. Health & Safety Code § 32000 *et seq.* (Local Health Care District Law). Its powers are limited to those granted it by the state. *See* Cal. Health & Safety Code § 32001.

Among its powers, Palomar Pomerado may "establish, maintain, and operate" health facilities. *See* Cal. Health & Safety Code § 32121(j). To meet this end, Palomar Pomerado possesses and exercises limited governmental functions within a particular area of the state. For example, Palomar Pomerado possesses the power to levy taxes and issue bonds. *See* Cal. Health & Safety Code §§ 32200-32243, 32316-32321. It also has the power of eminent domain. *See* Cal. Health & Safety Code § 32121(d). As such, it is a "political subdivision" and an agency of the state. *See* 58 Cal. Jur.3d § 12 ("all public corporations exercising governmental functions within a

limited portion of the state – counties, cities, reclamation districts, irrigation districts – are agencies of the state").

Such political subdivisions, like "[m]unicipal corporations[,] have generally been denied standing in the federal courts to attack state legislation as violative of the federal Constitution, on the ground that they have no rights against the state of which they are a creature." *Hart and Wechsler's The Federal Courts and The Federal System* 180 (Richard H. Fallon et al., eds.1996).

In sum, Palomar Pomerado is a creature of the state. Counsel for Palomar Pomerado conceded at oral argument that the district continues to exist at the pleasure of the state, its legislature, and its citizens. Moreover, Palomar Pomerado's powers are limited to those granted by the state. *See* Cal. Health & Safety Code § 32001. Finally, as stated above, Palomar Pomerado possesses and exercises governmental functions. Accordingly, Palomar Pomerado is a "political subdivision" for purposes of the standing doctrine discussed in *South Lake Tahoe*.

C.

Palomar Pomerado argues that we should not apply *South Lake Tahoe* because Palomar Pomerado brings this action against named state employees and not against the state. But as the following discussion indicates, Palomar Pomerado's action is in fact an action against the State of California.

" '[T]he general rule is that relief sought nominally against [a state] officer is in fact against the sovereign if the decree would operate against the latter.' " *Pennhurst*

State Sch. & Hosp. v. Halderman, 465 U.S. 89, 101, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984) (quoting *Hawaii v. Gordon*, 373 U.S. 57, 58, 83 S.Ct. 1052, 10 L.Ed.2d 191 (1963) (per curiam)); *Dugan v. Rank*, 372 U.S. 609, 620, 83 S.Ct. 999, 10 L.Ed.2d 15 (1963) (an action is against the state "if the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act") (internal quotations omitted). Here, the purpose of the injunction and other orders Palomar Pomerado seeks is to "restrain the Government" from reducing the Medi-Cal payment rates charged by Palomar Pomerado to the discounted rates offered patients who pay privately or who are privately insured. The result Palomar Pomerado seeks would "interfere with the public administration." As such, Palomar Pomerado's action falls under the category of actions against state officials that are in fact actions against the state.

Ex parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), provides an exception to the "general rule" set out above. Assuming that Palomar Pomerado could establish standing, the fact that it is suing defendants in their individual capacities would allow it to invoke *Ex parte Young* to circumvent the state's Eleventh Amendment immunity. *See id.* at 155-56, 28 S.Ct. 441. But *Ex parte Young* does not provide Palomar Pomerado with standing to sue in federal court. *Young* only provides "a narrow exception to *Eleventh Amendment immunity* for certain suits seeking declaratory and injunctive relief against unconstitutional actions taken by state officers in their official capacities." *Rounds v. Oregon State Bd. of Higher*

Educ., 166 F.3d 1032, 1036 (9th Cir.1999) (emphasis added); *see also Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9th Cir.1997) (*Young* "provides a narrow . . . exception to *Eleventh Amendment immunity*") (emphasis added).

III.

Palomar Pomerado is a political subdivision of the State of California. As such, it lacks standing to bring an action against the state in federal court – at least to the extent that its action challenges the validity of state regulations on due process and Supremacy Clause grounds. *See South Lake Tahoe*, 625 F.2d at 233-34 ("Because all of its claims are based on the [federal] Constitution, the City's challenge was properly dismissed [on standing grounds].").

Because Palomar Pomerado lacks standing, the federal courts are without jurisdiction over this action. *See id.* at 233. Accordingly, this appeal is DISMISSED, and the decision of the district court is VACATED.

MICHAEL DALY HAWKINS, Circuit Judge, concurring:

The majority is undoubtedly correct in applying current circuit law, especially the way in which *City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 625 F.2d 231 (9th Cir.1980), has been subsequently interpreted. *See Burbank-Glendale-Pasadena Airport Auth. v. City of Burbank*, 136 F.3d 1360 (9th Cir.1998). Because the current law in this circuit calls for a ban on *any* constitutional challenge by a political subdivision against its "parent

state" – an interpretation at odds with at least three other circuits – I believe our en banc court should take another look at *South Lake Tahoe* and its progeny.

South Lake Tahoe cited a long list of cases to support the statement that "[a] City may not challenge [a state agency's] plans and ordinances on constitutional grounds." However, none of the cited cases involved a Supremacy Clause challenge (at issue in *South Lake Tahoe*); rather, they addressed Fourteenth Amendment or Contract Clause challenges. *Burbank-Glendale-Pasadena Airport Authority v. City of Burbank*, 136 F.3d 1360 (9th Cir.1998), simply relied on *South Lake Tahoe*. We have thus never satisfactorily stated our rationale for including all constitutional challenges within the ban.

On the other hand, circuits that have rejected a "per se" rule against all constitutional challenges have provided convincing reasons for doing so. In *Rogers v. Brockette*, 588 F.2d 1057 (5th Cir.1979), the Fifth Circuit traced the history of cases denying standing to political subdivisions that sued their parent states. The court focussed on the foundational Supreme Court cases which dealt with municipalities' rights under the Contract Clause, the Just Compensation Clause, and Equal Protection. *See, e.g., Williams v. Mayor & City Council of Baltimore*, 289 U.S. 36, 53 S.Ct. 431, 77 L.Ed. 1015 (1933); *Trenton v. New Jersey*, 262 U.S. 182, 43 S.Ct. 534, 67 L.Ed. 937 (1923); *Hunter v. City of Pittsburgh*, 207 U.S. 161, 28 S.Ct. 40, 52 L.Ed. 151 (1907).

In these cases, the Court's primary concern was that a state whose relations with its municipalities were bound by the broad constitutional principles that govern

its relations with private parties would be practically unable to legislate. *See Rogers,* 588 F.2d at 1068-69. Although the cases spoke in terms of standing, they are more accurately described as "substantive holdings that the Constitution does not interfere in states' internal political organization." *Id.* at 1069 (noting that "standing" had a different meaning when *Hunter,* etc. were decided). Not every constitutional provision presents the danger of such interference. *Rogers* concluded that where a municipality alleged a violation of federal law under the Supremacy Clause, it was Congress, not the Constitution, that was interfering in the states' internal political organization.

The Tenth Circuit has also interpreted the early Supreme Court cases more narrowly, describing them as "stand[ing] only for the limited proposition that a municipality may not bring a constitutional challenge against its creating state when the constitutional provision that supplies the basis for the complaint was written to protect individual rights, as opposed to collective or structural rights." *Branson Sch. Dist. RE-82 v. Romer,* 161 F.3d 619, 628 (10th Cir.1998). Challenges based on the latter category of rights, the Tenth Circuit reasoned, do not raise the spectre of the "chaos" of lawsuits generated by "mere disagreement by a political subdivision with the policies of its parent state." *Id.* at 630. The *Branson* court thus allowed a school district to invoke the Supremacy Clause against its parent state for violation of a federal law.

Indeed, the Supreme Court has itself indicated that its rule does not apply equally to all constitutional challenges. In *Gomillion v. Lightfoot,* 364 U.S. 339, 81 S.Ct. 125,

5 L.Ed.2d 110 (1960), a case that did not directly present the issue of a municipality's standing to sue, the Court had opportunity to interpret the *Hunter* line of cases, and stated:

> [A] correct reading of the seemingly unconfined dicta of Hunter and kindred cases is not that the State has plenary power to manipulate in every conceivable way, for every conceivable purpose, the affairs of its municipal corporations, but rather that the State's authority is unrestrained *by the particular prohibitions of the Constitution considered in those cases.*

Gomillion, 364 U.S. at 344, 81 S.Ct. 125 (emphasis added). When the Supreme Court denied certiorari in *South Lake Tahoe*, Justice White dissented on the grounds that a per se rule was inconsistent with *Board of Education v. Allen*, 392 U.S. 236, 88 S.Ct. 1923, 20 L.Ed.2d 1060 (1968), a case in which a local board of education challenged the constitutionality of a state statute on First Amendment grounds. *See City of South Lake Tahoe v. California Tahoe Reg'l Planning Agency*, 449 U.S. 1039, 1042, 101 S.Ct. 619, 66 L.Ed.2d 502 (1980) (White, J., dissenting from denial of certiorari).

The Fifth and Tenth Circuits have noted another apparent limitation on the breadth of the rule, this one stemming from the nature of the political subdivision rather than the nature of the constitutional provision. In one of its earliest cases on the subject, the Supreme Court made the following observation:

> It will be observed that, in describing the absolute power of the state over the property of municipal corporations, we have not extended it

> beyond the property held and used for governmental purposes. Such corporations are sometimes authorized to hold and do hold property for the same purposes that property is held by private corporations or individuals. The distinction between property owned by municipal corporations in their public and governmental capacity and that owned by them in their private capacity, though difficult to determine, has been approved by many of the state courts, and it has been held that, as to the latter class of property, the legislature is not omnipotent.

Hunter at 179, 28 S.Ct. 40 (*quoted in Rogers*, 588 F.2d at 1069). Relatedly, in *Lassen v. Arizona ex rel. Arizona Highway Dep't*, 385 U.S. 458, 87 S.Ct. 584, 17 L.Ed.2d 515 (1967), the Court stated, "This action is in form and substance a controversy between two agencies of the State of Arizona. . . . We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause. He is essentially the trustee of the trust at issue here, with custody of the trust lands." *Id.* at 460 n. 1, 87 S.Ct. 584 (*quoted in Branson*, 161 F.3d at 629). In short, the Court has recognized a difference between political subdivisions acting in their governmental roles and political subdivisions acting in a private or substantially independent capacity. The latter may be able to sue the state in situations where the former could not.

The Fifth and Tenth Circuits are joined by the Eleventh Circuit in expressly rejecting a per se rule. *See United States v. Alabama*, 791 F.2d 1450, 1455 (11th Cir.1986). Other circuits have suggested, without holding, that they

do not favor such a rule. *See City of Charleston v. Public Serv. Comm.*, 57 F.3d 385, 389-90 (4th Cir.1995) (noting that a political subdivision's standing regarding a non-Fourteenth Amendment claim was "unclear" and proceeding to resolve the issue on the merits); *South Macomb Disposal Auth. v. Township of Washington*, 790 F.2d 500, 504 (6th Cir.1986) (noting that "[t]here may be occasions in which a political subdivision is not prevented, by virtue of its status as a subdivision of the state, from challenging the constitutionality of state legislation"). Certainly the Ninth Circuit is alone in having barred Supremacy Clause challenges by political subdivisions against their parent states.

The existence of a contrary view in other circuits does not automatically suggest a need to reexamine our own position. However, where the other circuits' view is well and thoroughly reasoned, we should at least satisfy ourselves that our position is grounded in an equally solid rationale. I therefore suggest that we revisit *South Lake Tahoe's* holding en banc.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PALOMAR POMERADO HEALTH SYSTEM, a Health Care District, Plaintiff-Appellant, v. KIMBERLY BELSHE, Director of the California Department of Health Services; DIETER MERKLE; and CURTIS COTTON, Defendants-Appellees.	)	No. 98-15794 ORDER (Filed Sep. 15, 1999)

Before: LAY,[1] PREGERSON, and HAWKINS, Circuit Judges.

The members of the panel that decided this case votes unanimously to deny the petition for rehearing. Judges Pregerson and Hawkins voted to reject the suggestion for rehearing en banc and Judge Lay so recommended said rejection.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

---

[1] Honorable Donald P. Lay, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

42 U.S.C. § 1396a(a)(13) [Current]

[A State plan for medical assistance must provide]

(A) for a public process for determination of rates of payment under the plan for hospital services, nursing facility services, and services of intermediate care facilities for the mentally retarded under which –

(i) proposed rates, the methodologies underlying the establishment of such rates, and justifications for the proposed rates are published,

(ii) providers, beneficiaries and their representatives, and other concerned State residents are given a reasonable opportunity for review and comment on the proposed rates, methodologies, and justifications.

(iii) final rates, the methodologies underlying the establishment of such rates, and justifications for such final rates are published, and

(iv) in the case of hospitals, such rates take into account (in a manner consistent with section 1923) the situation of hospitals which serve a disproportionate number of low-income patients with special needs;

* * *

---

42 U.S.C. § 1396a(a)(13) [Prior To Oct. 1, 1997]

[A State plan for medical assistance must provide]

(A) for payment (except where the State agency is subject to an order under section 1914) of the hospital services, nursing facility services and services in an intermediate care facility for the mentally retarded provided

under the plan through the use of rates (determined in accordance with methods and standards developed by the State which, in the case of nursing facilities, take into account the costs (including the costs of services required to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident eligible for benefits under this title) of complying with subsection (b) (other than paragraph (3)(F) thereof). (c), and (d) of section 1919 and provide (in the case of a nursing facility with a waiver under section 1919(b)(4)(C)(ii)) for an appropriate reduction to take into account the lower costs (if any) of the facility for nursing care, and which, in the case of hospitals, take into account the situation of hospitals which serve a disproportionate number of low income patients with special needs and provide, in the case of hospital patients receiving services at an inappropriate level of care (under conditions similar to those described in section 1861(v)(1)(G)), for lower reimbursement rates reflecting the level of care actually received (in a manner consistent with section 1861(v)(1)(G)) which the State finds, and makes assurances satisfactory to the Secretary, are reasonable and adequate to meet the costs which must be incurred by efficiently and economically operated facilities in order to provide care and services in conformity with applicable State and Federal laws, regulations, and quality and safety standards and to assure that individuals eligible for medical assistance have reasonable access (taking into account geographic location and reasonable travel time) to impatient hospital services of adequate quality; and such State makes further assurances, satisfactory to the Secretary, for the filing of uniform cost reports by each

hospital, nursing facility, and intermediate care facility for the mentally retarded and periodic audits by the State of such reports:

* * *

---

42 U.S.C. § 1396a(a)(30)

[A State plan for medical assistance must]

(A) provide such methods and procedures relating to the utilization of, and the payment for, care and services available under the plan (including but not limited to utilization review plans as provided for in section 1903(i)(4)) as may be necessary to safeguard against unnecessary utilization of such care and services and to assure that payments are consistent with efficiency, economy, and quality of care and are sufficient to enlist enough providers so that care and services are available under the plan at least to the extent that such care and services are available to the general population in the geographic area.

(B) provide, under the program described in subparagraph (A), that –

(i) each admission to a hospital, intermediate care facility for the mentally retarded, or hospital for mental diseases is reviewed or screened in accordance with criteria established by medical and other professional personnel who are not themselves directly responsible for the care of the patient involved, and who do not have a significant financial interest in any such institution and are not, except in the case of

a hospital, employed by the institution providing the care involved, and

(ii) the information developed from such review or screening, along with the data obtained from prior reviews of the necessity for admission and continued stay of patients by such professional personnel, shall be used as the basis for establishing the size and composition of the sample of admissions to be subject to review and evaluation by such personnel, and any such sample may be of any size up to 100 percent of all admissions and must be of sufficient size to serve the purpose of (I) identifying the patterns of care being provided and the changes occurring over time in such patterns so that the need for modification may be ascertained, and (II) subjecting admissions to early or more extensive review where information indicates that such consideration is warranted to a hospital, intermediate care facility for the mentally retarded, or hospital for mental diseases; and

(C) use a utilization and quality control peer review organization (under part B of title XI), an entity which meets the requirements of section 1152, as determined by the Secretary, or a private accreditation body to conduct (on an annual basis) an independent, external review of the quality of services furnished under each contract under section 1903(m), with the results of such review made available to the State and, upon request, to the Secretary, the Inspector General in the Department of Health and Human Services, and the Comptroller General;